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The Voting Rights Act of 1965: Is It Applicable to State Judicial Elections?

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I. PRELIMINARIES

A few years after Congress amended section 2 of the Voting Rights Act of 1965, suits were filed against a number of states in an attempt to modify state judicial election systems so that racial and ethnic voting populations have an equal opportunity to participate in the voting process and to elect candidates of their choice.[1] These suits challenged the use of state judicial election systems which, through the combination of racially-polarized bloc voting patterns and the current districting schemes, dilute minority voting strength in a way that denies minority voters the equal opportunity to participate in the electoral processes.[2] These section 2 actions have raised two fundamental issues: whether section 2 applies to state judicial elections and what remedies are appropriate for a federal court to impose upon the existing state election system. This comment explores the pertinent development of the law governing vote dilution claims in relation to a recent controversy over whether the protection from vote dilution granted to minority voters in section 2 of the Voting Rights Act is applicable to judicial elections.[3] The author submits that the statute brings within its purview all types of elections and all forms of electoral

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1. Section 2 of the Voting Rights Act of 1965; as amended in 1982, is codified at 42 USC § 1973, is reprinted at note 39, and is hereinafter referred to as "section 2."

2. Reported decisions involving state judicial election systems and vote dilution claims brought under section 2 include the following: *Clark v Edwards*, 725 F Supp 285 (M D La 1988); *Clark v Roemer*, 750 F Supp 200 (M D La 1990); *Chisom v Edwards*, 659 F Supp 183 (M D La 1988), aff'd, 839 F2d 1056 (5th Cir 1988), cert denied sub nom, *Roemer v Chisom*, 488 US 955 (1988); *Williams v State Board of Elections*, 696 F Supp 1563 (N D Ill 1988); *Southern Christian Leadership Conference of Alabama v Siegelman*, 714 F Supp 511 (M D Al 1989); *Mallory v Eyrich*, 839 F2d 275 (6th Cir 1988); *Martin v Allian*, 658 F Supp 1183 (S D Miss 1987); *LULAC v Clements*, 902 F2d 293, rev'd, 914 F2d 620 (5th Cir 1990) (en banc), cert granted, *Houston Lawyer's Association v Attorney General of Texas*, 111 S Ct 775 (1991).

3. In overruling its prior precedent established in *Chisom v Edwards*, the Fifth Circuit's recent decision in *League of United Latin American Citizens v Clements*, 914 F2d 620 (5th Cir 1990) (en banc), held that section 2 was not applicable to any state judicial elections. The Supreme Court has granted certiorari on this issue. *Houston Lawyer's Assoc v Attorney General of Texas*,____US____, 111 S Ct 775 (1991).

voting processes and is directly applicable to all state judicial elections. However, before this issue can be squarely confronted, some background information is essential.

The concept of vote dilution was first raised in the case of *Fortson v Dorsey*,[4] where the United States Supreme Court stated in dicta that

> [i]t might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.[5]

The Supreme Court made a similar observation about vote dilution claims in *Gaffney v Cummings*:[6]

> A districting plan may create multimember districts perfectly acceptable under equal protection standards, but invidiously discriminatory because they are employed to 'minimize or cancel out the voting strength or racial or political elements of the voting population."[7]

Similarly, in *White v Regester*,[8] the Court reversed a district court's decision that a reapportionment plan for the Texas House of Representatives violated the one-person, one-vote principles, but affirmed the district court's separate conclusion that a particular portion of the plan unlawfully diluted minority voting strength.[9] The Supreme Court directly considered vote dilution claims in the cases of *Burns v Richardson*,[10] *Whitecomb v Chavis*,[11] *White v Regester*,[12] and *Zimmer v McKeithen*.[13] The plaintiffs were successful in establishing a claim based upon vote dilution in *White* and *Zimmer*. These early cases did not require a specific showing of purposeful discrimination.

The concept of vote dilution involves two contributing factors which act in tandem to produce a discriminatory result at the polls: (1) the existence of racially-polarized bloc voting within cer-

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4. 379 US 433 (1965).
5. *Fortson*, 379 US at 439.
6. 412 US 735 (1973).
7. *Gaffney*, 412 US at 751 (citation omitted).
8. 412 US 755 (1973).
9. *White* is discussed at notes 47 to 50 and accompanying text.
10. 384 US 73 (1966).
11. 403 US 124 (1971).
12. 412 US 755 (1973).
13. 485 F2d 1297 (5th Cir 1973), aff'd sub nom, *East Carroll Parish School Board v Marshall*, 424 US 636 (1976).

tain voting populations and (2) districting schemes which, in combination with this bloc voting, operate in a manner that minimizes or cancels out minority voting strength. Typical of the disputed election systems are multimember districts, wherein each voter is entitled to one vote for each identical office open for election. In this situation, a minority voting population of forty-nine percent can effectively be denied the opportunity to elect candidates, assuming that most voting follows a majority/minority candidate preference and racial bloc voting continually exists. Another typical scheme challenged is the election of candidates from individual districts where the boundary lines of the districts have been drawn in such a way as to produce the neutralization or diminution of minority voting strength. Typically, the plaintiffs claim that by drawing new subdistricts or reapportioning existing districts, a more equitable system that includes greater success for minority candidates can be instituted. The concern in challenging these systems is not with population equality in the districts; instead, the focus is on the relationship between election districts, voting practices and minorities' ability to participate effectively in the electoral process.[14] Plaintiffs seek what has been coined "full value" for their votes and an assurance that their votes will not be diluted or weakened by the bloc voting of whites.[15]

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14. See Judith Haydel, *Section 2 of the Voting Rights Act of 1965: A Challenge to State Judicial Election Systems*, 73 Judicature 68, 69 (1989).

15. Haydel, 73 Judicature at 68, n.9 (cited in note 14) (citing Thernstrom, *Whose Vote Counts? Affirmative Action and Voting Minority Rights*, (Harvard University Press, 1987)). This notion of a right to FULL VALUE for minority votes cast is based upon the protections granted by section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. The Fourteenth Amendment provides:

> Section 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

US Const, Amend XIV, §§ 1, 5.

The Fifteenth Amendment states:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

US Const, Amend XV.

II. Background

A. *The Historical Development of the One-Person, One-Vote Principle's Non-Applicability to State Judicial Districting*

Early suits against allegedly discriminatory judicial election systems contended that judicial election districts must be drawn in compliance with *Reynolds v Sims*[16] and the "one-person, one-vote" rule.[17] Based on this principle, the plaintiffs in *Wells v Edwards*[18] challenged the Louisiana Supreme Court districts, contending that the districting violated the one-person, one-vote rule.[19] The Supreme Court affirmed[20] the district court's ruling that the one-person, one-vote rule is not applicable to judicial elections. The trial court had reasoned that judges do not represent the electorate in a governing body which makes political policy.[21] The district court noted that

> [t]he primary purpose behind the one-man, one-vote apportionment is to make sure each official member of an elected body speaks for approximately the same number of constituents. But as stated in *Buchanan v. Rhoades*, [249 F Supp 860 (ND Ohio), appeal dismissed, 385 US 3 (1960)]: 'Judges do not represent people, they serve people.' Thus, the rationale behind the one-man, one vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary. 'The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government.'[22]

Accordingly, federal courts have operated upon the assumption that the Constitution does not require geographic equality among the districting of judicial districts drawn by states. A constitutionally-claimed right to equality in geographic apportionment was expressly denied by the holding in *Wells*.[23] The federal courts refuse

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16. 377 US 533 (1964).

17. See for example, *Holshouser v Scott*, 335 F Supp 928 (M D NC 1971), aff'd, 409 US 807 (1972).

18. 347 F Supp 453 (M D La 1972), aff'd, 409 US 1095 (1973).

19. The Louisiana Supreme Court districts were six in number. Each district elected one supreme court justice, except for the First Supreme Court District from which two justices were elected. The First District included the Orleans, Jefferson, St. Bernard and Plaquemines Parishes. La Const Art 7, § 9 (1972).

20. *Wells v Edwards*, 347 F.Supp 453 (M D La 1972), aff'd, 409 US 1095 (1973).

21. *Wells*, 347 F Supp at 455.

22. *Wells*, 347 F Supp at 455-56 (citation omitted).

23. The current vote dilution cases are based upon a distinction between the above lack of malapportionment requirements for state judicial election systems and a right to "full value" of voting participation. The former involves the minimal standards guaranteed by the rights procured by the Fourteenth Amendment; the latter involves expressly-given statutory rights under the Voting Rights Act and the Fifteenth Amendment. The one-per-

to numerically equalize the populations of districts in state judicial elections.[24]

B. *The Supreme Court's Interpretations of Section 2 and the Circumstances Leading to the 1982 Amendment of the Voting Rights Act*

The early cases challenging the Voting Rights Act alleged that the Act was an unconstitutional encroachment on state sovereignty and disputed the applicable scope of the Act. The Supreme Court upheld the constitutionality of the Act in *South Carolina v Katzenbach*,[25] focusing on the purpose of the Act as reflected from the language in the statute and legislative history: "The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."[26] In construing the scope of the Act, Chief Justice Warren noted the following about the legislative history:

> The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State even in a minor way. For example, [section] 2 of the Act, as originally drafted, included a prohibition against any 'qualification or procedure.' During the Senate hearings on the bill, Senator Fong expressed concern that the word 'procedure' was not broad enough to cover various practices that might effectively be employed to deny citizens their right to vote. In response, the Attorney General said he had no objection to expanding the language of the section, as the word 'procedure' 'was intended to be all-inclusive of any kind of practice.' Indicative of an intention to give the Act the broadest possible scope, Congress expanded the language in the final version of [section] 2 to include any 'voting qualifications or prerequisite to voting, or standard, practice, or procedure.'[27]

As the Voting Rights Act was enacted "to rid the country of racial discrimination [within the electoral process],"[28] the Supreme Court, in early challenges to the constitutionality of the Act, consistently claimed to have interpreted the Act in a manner which is

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son, one-vote rule of the equal protection clause developed from vote dilution resulting from the growth of heavily populated urban areas; racial composition of the districts was not even an issue.

24. See *Buchanan v Gilligan*, 349 F Supp 569 (N D Ohio 1972).

25. 383 US 301 (1966).

26. *Katzenbach*, 383 US at 308.

27. *Allen v State Board of Elections*, 393 US 544, 566-67 (1969).

28. *Katzenbach*, 383 US at 315. See also, *Chisom v Edwards*, 839 F2d 1056, 1059 (5th Cir 1988).

consistent with " 'the broadest possible scope' in combatting racial discrimination."[29]

Nevertheless, in *City of Mobile, Alabama v Bolden*,[30] a plurality of the justices concluded that section 2 was co-extensive with the Fifteenth Amendment and required a showing of purposeful or intentional discrimination in the creation or maintenance of an electoral practice or mechanism in order to make out a violation of the Act.[31] A class action was brought by the plaintiffs in *Bolden* on behalf of all black voters in Mobile, alleging that the system of electing three city commissioners-at-large (in which the three representatives shared all legislative and executive authority vested in city officials), unfairly diluted minority voting strength in violation of the Fourteenth and Fifteenth Amendments and section 2. A disproportionate effect on the success of minority candidates was factually established. The district court found a violation of the plaintiffs' constitutional rights and ordered that the commission system be replaced by a mayor and city council system which included single-member voting districts. The Fifth Circuit affirmed. The Supreme Court reversed and remanded.[32]

There was intense disagreement among the justices as to the standard of review and the burden of proof necessary to establish a prima facie violation of the Equal Protection Clause and the Fifteenth Amendment in a vote dilution case. The plurality opinion written by Justice Stewart admitted that dicta in prior cases such as *White v Regester*,[33] *Whitecomb v Chavis*,[34] *Fortson v Dorsey*,[35] and *Burns v Richardson*[36] could be read to suggest that a voting

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29. *Chisom*, 839 F2d at 1059 (quoting *Allen v State Board of Elections*, 393 US 544, 565 (1969)).

30. 446 US 55 (1980).

31. *Mobile*, 446 US at 62. The Court concluded that section 2 added nothing to the Fifteenth Amendment claim in the case. Id at 61. The Court simply inferred from the language used in the statute and the legislative history that the section was a restatement of the Fifteenth Amendment and that Congress, therefore, intended the "intent test," developed in *Washington v Davis* and its progeny, to be applicable to all section 2 cases. Id. At the time *Mobile* was decided, section 2 read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 USC § 1972 (1975).

32. *Mobile*, 446 US at 58-9 (1980).

33. 412 US 755 (1973).

34. 403 US 124 (1971).

35. 379 US 433 (1965).

36. 384 US 73 (1966).

dilution claim could be upheld under the equal protection clause when there was a showing of discriminatory treatment based on either "purpose or effect."[37] The *Bolden* opinion teaches that to have a constitutional violation of the Fourteenth and Fifteenth Amendments in a voting dilution case, intentional discrimination in the establishment or maintenance of the electoral procedure or practice must be established.

Within two years Congress removed the "smoking gun" requirement deemed by the *Bolden* plurality as necessary to establishing a violation of the Voting Rights Act.[38] Congress amended the section to dispositively reject the "intent test" and restore a "results test."[39] The Senate Judiciary Committee Report[40] which accompa-

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37. *Mobile*, 446 US at 67. Justice Marshall reasoned that the prior precedent established that a finding of disproportionate impact coupled with other relevant factual findings which contribute to cause a discriminatory pattern and effect could sufficiently support the judgment below; a finding of purposeful invidious discrimination was not necessary. Id at 107-9 (Marshall, dissenting).

38. Senator Mathias, a proponent of the amendments, summarized the need for change as follows:

> The House amendment is needed to clarify the burden of proof in voting discrimination cases and to remove the uncertainty caused by the Supreme Court to articulate a clear standard in *City of Mobile v Bolden*. . . . We are not trying to overrule the Court. The Court seems to be in some error about what the legislative intent was. . . . Prior to *Bolden*, a violation in voting discrimination cases [could] be shown by reference to a variety of factors that, when taken together, added up to a finding of illegal discrimination. But in *Bolden*, the plurality appears to have abandoned this totality of circumstances approach and to have replaced it with a requirement of specific evidence of intent . . . this is a requirement of a smoking gun, and I think it becomes a crippling blow to the overall effectiveness of the Act.

Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong, 2d Sess 3, 199 (1982).

39. The pertinent section of the Voting Rights Act of 1965, as amended, is codified at 42 USC § 1973(b) and the full text of section 2 is as follows:

> § 1973
>
> Denial or abridgement or right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this

nied the bill specifically rejected the notion that specific intent to discriminate was required, and stated that the results test utilized prior to the *Bolden* decision was the appropriate legal standard for voting rights cases.[41] Senator Dole, who proposed the ultimate language of section 2, described the bill as follows:

> Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress. . . . The standard is whether the political processes are equally 'open' in that members of a protected class have the same opportunity as others to participate in the political process and to elect candidates of their choice.[42]

Section 2, known as the Dole Compromise, codified the pre-*Bolden* "results test" and its accompanying burden of proof articulated in earlier cases.

C. *The Language of the Act and the Legislative History Accompanying Section 2*

The Senate Report provided some useful guidelines for courts to follow in analyzing voting discrimination claims. The Senate Report rejected the *Bolden* intent test for three reasons: it "asks the wrong question;" it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities;" and it creates an "inordinately difficult" burden of proof on plaintiffs.[43] The Report also listed nine factors to guide a court in determining whether a section 2 violation has occurred: (1) the history of official discrimination within the political unit; (2) whether voting within the political unit is racially polarized; (3)

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section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

As amended, P L 97-205, § 3, 96 Stat 134 (June 29, 1982).

40. Senate Report No 97-417 (1982) (hereinafter S Rep), reprinted in 1982 USCCAN 177, 205-06.

41. "The [Senate] report notes that in pre-Bolden cases such as *White v. Regester*, 412 U.S. 755 (1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the 'results test,' plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." *Thornburg v Gingles*, 478 US 30, 44, n.8 (1986); See for example, S Rep 2, 15-6, 27, reprinted in 1982 USCCAN at 178, 192-93, 204-05.

42. S Rep 193-96 (Additional Views of Senator Robert Dole), reprinted in 1982 USCCAN at 363-64.

43. S Rep at 2, 27, 28, 29, n.118, 36, reprinted in 1982 USCCAN at 178, 204-07, 214; see also, *Thornburg*, 478 US at 44.

unusual majority voting requirements or large districts, or other voting practices or procedures which perpetuate the opportunity for discrimination against minorities; (4) whether minority group candidates have been denied access to the candidate slating process; (5) the extent to which minority voters bear the effects of discrimination in social areas such as education, employment and health services, which discrimination affects their ability to participate effectively in the political process; (6) whether elections are tainted with issues of racism; (7) the extent to which minority members have been elected to office; (8) whether elected officials are attentive to minority needs; and (9) whether the justification for the policy behind the practice or procedure is tenuous.[44] These factors were derived from the analytical framework of *White v Regester*,[45] as refined and developed by the Fifth Circuit in *Zimmer v McKeithen*.[46]

The language incorporated into section 2(b) of the 1982 Amendment is remarkably similar to language used in the *White* opinion. There, the plaintiffs challenged a state-wide reapportionment plan for the Texas House which was comprised of 79 single-member districts and 11 multimember districts. The plan encompassed a 9.9 percent deviation between the smallest district and the largest. The district court found that the plan was unconstitutional because the state failed to justify the deviations in population size; additionally, the court found that the two multimember districts unconstitutionally diluted minority voting strength in those districts.[47] The Supreme Court affirmed in part and reversed in part. Six Justices agreed that the 9.9 percent variation, in and of itself, was insufficient to support a claim for unconstitutional discrimination. However, the findings with regard to vote dilution in the multimember districts were affirmed.[48] In affirming the order that Dallas and Bexar Counties be re-drawn into single member districts, Justice White wrote the following:

> Plainly, under our cases, multimember districts are not per se unconstitu-

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44. S Rep at 28-9, reprinted in 1982 USCCAN at 205-07; see also *Thornburg*, 478 US at 37.

45. 412 US 755 (1973).

46. 485 F2d 1297 (5th Cir 1973) (en banc), aff'd sub nom, *East Carroll Parish School Board v Marshall*, 424 US 636 (1976) (per curium). See also, S Rep at 28, n.113, reprinted in 1982 USCCAN at 206; *Thornburg*, 478 US at 37, n.4.

47. *White*, 412 US at 755-60. The decision of the three-judge district court was appealed directly to the Supreme Court upon the authority of 28 USC section 1253. *White*, 412 US at 759.

48. Id at 765-70.

> tional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. . . . But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. See *Whitecomb v. Chavis*, supra; *Burns v. Richardson*, supra; *Fortson v. Dorsey*, supra. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their own choice.[49]

The current language of section 2 closely tracts Justice White's summation of prior precedent on the burden of proof required. Moreover, the legislative history of the section 2 amendments makes clear that Congress' intent in adding subsection 2(b) was to codify this burden of proof and to ensure that "results" would be a permissive factor to be considered in determining, from the totality of the circumstances, whether a section 2 violation has been established.[50]

D. *Establishing a Claim of Vote Dilution; Common State Defenses*

The Supreme Court added a number of refinements to the ele-

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49. Id at 765-66.

50. See 97th Cong, 2d Sess 27, reprinted in 1982 USCCAN 177, 205 (purpose in adding the Amendment was to "embod[y] the test laid down in *White*"). The Supreme Court noted the following about the Amendment:

> The Senate Report states that amended 2 was designed to restore the 'results test'—the legal standard that governed voting discrimination cases prior to our decision in *Mobile v. Bolden*. . . . Under the 'results test,' plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg, 478 US 30, 43 n.8 (1986).

Judge Johnson, writing for the panel decision in *Chisom v Edwards*, 839 F2d 1056 (5th Cir 1988), commented upon the great similarity between the language of the statute and the language used by the Supreme Court in *White*:

> In amending section 2, Congress preserved the operative language of subsection (a) defining the coverage of the Act and merely added subsection (b) to adopt the 'results test' for proving a violation of section 2. In fact, the language added by Congress in subsection (b)—'to participate in the electoral process and to elect representatives of their choice'—is derived almost verbatim from the Supreme Court's standard governing claims of vote dilution on the basis of race set forth in *White v. Regester*.

Chisom, 839 F2d at 1062.

It is important to note that the limitation in *White* denying a right to have an equal number of candidates elected was also incorporated into the statute. See note 39.

ments of a claim of vote dilution in *Thornburg v Gingles*.[51] The plaintiffs in *Thornburg* were registered black voters in North Carolina. They challenged the enactment of a redistricting plan for the state legislature, which plan included a number of multidistricts having substantial numbers of white voters and, at the same time, sufficient numbers of concentrated black voters to form single-member black majority districts. While the action was pending, an election occurred in which a number of black candidates enjoyed an unusual success rate. In one district (House District 23), black candidates had been elected in proportion to their population (six seats filled) for the past six elections. The district court ruled that (1) a claim of vote dilution could be established by showing a vote dilution effect, and that (2) all districts were in violation of section 2.[52] The Attorney General of North Carolina and other officials then directly appealed to the Supreme Court. On appeal, the officials argued the following: (1) the district court had used the wrong standard in determining whether the contested districts exhibited the necessary level of racial bloc voting to establish a cognizable claim under section 2; (2) the court also used an incorrect definition of racially-polarized voting and erroneously relied upon statistical evidence that was not probative of polarized voting; (3) the success of some black candidates in recent elections was not given its due weight in consideration of the evidence; and (4) the trial court erred in concluding that a claim for vote dilution had been properly established.[53]

In resolving the above issues, a five-member majority held that generally, in order to establish a violation of section 2 where multimember districts are involved, the plaintiffs must establish the following elements: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive and the white

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51. 478 US 30 (1986).

52. The factual and procedural history of this case is reported in *Gingles v Edmisten*, 590 F Supp 345, 350-58 (E D NC 1984); see also, *Thornburg*, 478 US at 35-42. The district court made the following findings under the guidelines of the statute and its legislative history: (1) single-member districts with black majorities could be created in the disputed areas; (2) the effects of historic discrimination had hindered black voter participation in the state; (3) other voting procedures had also hindered blacks in electing candidates; (4) white voters had encouraged racial bloc voting by making race an election issue; (5) black candidate success rates had been minimized by past practices; and (6) the statistical evidence showed severe and persistent racially-polarized voting in the challenged districts. The court then enjoined future elections in the challenged districts because they were in violation of section 2. *Thornburg*, 478 US at 42.

53. Id.

majority voters vote as a bloc which usually defeats the minority candidates (a showing that minorities usually vote for the same candidate is one method of proving the prerequisite of political cohesiveness); and (3) the white bloc voting which normally defeats minority candidates is strong enough in relation to minority strength and white cross-over votes to rise to the level of a legally sufficient white voting bloc.[54] The justices were unable to agree on the issue of whether the causation of racial bloc voting was an appropriate factor to be considered under section 2. Six justices agreed that the trial court's conclusion was erroneous with regard to District 23, because the recent success of black candidates in that district was not given appropriate consideration.[55] Justices Marshall, Blackmun and Stevens expressed the view that racially-polarized voting refers only to a correlation between the race of the voters and the election of certain candidates;[56] Justice White specially concurred, arguing that the race of the candidate is not an irrelevant factor in determining whether polarized racial voting exists for the purposes of section 2;[57] Justices O'Connor, Burger, Powell and Rehnquist agreed that statistical evidence of racial bloc voting, if admitted solely to show political cohesiveness, could not be rebutted by attributing such voting to other causes than race, but that such evidence is not irrelevant to the overall evaluation of whether there is vote dilution under section 2.[58]

Thornburg now provides the basic framework for evaluating vote dilution claims under section 2. Before convincing a court that a voting scheme or practice is invidiously discriminatory under the totality of the circumstances test, the minority group alleging a violation must come forward with adequate statistical proof that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; the minority voting bloc must establish that it is a politically cohesive group with regard to candidate preference; and the minority group's candidates must usually be defeated in a way that establishes that the white voting bloc is just that—a cohesive voting bloc which rises to

54. Id at 42-80. The Court also unanimously agreed that the "clearly erroneous" test of FRCP 53 governs the trial court's findings of vote dilution. *Thornburg*, 478 US at 42-107.

55. Id.

56. Id at 61-74.

57. Id at 83.

58. Id at 100-02. These justices dissented from the majority's tests for measuring minority voting strength and vote dilution because these justices thought that the two tests operated in tandem to give a right to equal proportional representation, something the statute expressly negates. Id at 94.

the level of a "legally significant" white voting bloc.[59] In general, there must be a regularity and consistency to the racial bloc voting which defeats the minority's preferred candidates. This defeat must occur over several election periods.

Defendant states have not dawdled in defending the suits brought against them. First, they demand that the minority group be sufficiently large and geographically compact to be a voter majority in an ungerrymandered single-member district. They also insist that the remedial districts sought not violate the one-person, one-vote rule and comply with the geographical equality requirements of the Equal Protection Clause.[60] Moreover, the methodologies and data used to estimate voter turnout and preference must be valid and statistically reliable.[61]

The plaintiff's burden of establishing racially-polarized voting is also an area where many evidentiary problems arise. Defendant states argue that it is not accurate to consider only those elections in which minority candidates were on the ballot. Instead, they ar-

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59. Id at 56. The Court determined that inquiring into the existence of racially-polarized voting is twofold. First, it is relevant to the determination of the minority group being politically cohesive; it also assists in determining whether whites vote sufficiently as a unit to defeat the preferred minority candidate. Establishing racial vote polarization that effectively precludes minorities from electing candidates of their choice is a factual inquiry which varies in relevant factors. This loss of political power is distinct from loss in an individual election, and "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are single elections." The number of elections to be studied will vary upon the circumstances. Also, where the minority group has sponsored candidates, its success rate is relevant. Where no candidates have been sponsored, or candidates have only been sponsored in recent elections, the court must look to other factors which reflect upon unequal access to the electoral process. Id at 57, n.25 and accompanying text.

60. This argument assumes that the remedy ordered cannot meet the strict scrutiny applied to review of a remedy which is implemented to cure racial discrimination. See *Richmond Va v J.A. Croson Co*, 109 S Ct 706 (1989). It is argued that the federal judiciary should not fashion a remedy which draws districts that violate the equal protection clause as defined in *Reynolds v Sims*. However, it is now clear that a deminimus variance between districts does not violate the Constitution. *White v Regester*, 412 US 755, 764 (1973) (9.9 percent derivation alone between largest and smallest district did constitute a violation where the mean average of all the districts was only 1.82 percent). Thus, the remedial redistricting does not have to exactly reflect the size of other districts within the category. Additionally, an injunction granted due to a section 2 violation would seem likely to survive the strict scrutiny applied to affirmative action remedies under the *Croson* approach.

61. See Ronald Weber, *The Voting Rights Act and Judicial Elections Litigation: The Defendant States' Perspective*, 73 Judicature 85 (1989). All statistical data and expert testimony must be based upon a sufficient number of cases; include variations on both dependent and independent variables; match election returns and polling results with the corresponding data of that period on racial composition and voting age populations; and also compare geographically the varying units involved. Weber, 73 Judicature at 86 (cited in this note).

gue, all elections must be used to determine whether the minority is denied the opportunity to elect candidates of their choice.[62] If non-minority candidates have been the candidates of minority preference and have been successful, this data should also be considered in determining whether a finding of vote dilution is warranted. Also, the issue of causation in establishing racially-polarized bloc voting patterns, and its corollary of minority candidates' defeat, is still an unsettled area after *Thornburg*.[63]

Another defense used by states concerns the single-officeholder exception. Where the alleged violation refers to a single-member office, there exists no possibility of a proportional share and, therefore, no vote dilution can occur where all eligible voters are permitted to participate. This rule was developed in *Butts v City of New York*,[64] in which a class of all eligible hispanic and black voters challenged a statute requiring a run-off election if no candidate received more than forty-percent of the vote in the primary. The office challenged was the position for New York mayor. The Second Circuit concluded that

> there is no such thing as a 'share' of a single-member office. . . . [S]o long as the winner of an election for a single-member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class an equal opportunity for representation.[65]

In general, the single-member office exception has the potential to eliminate entire classes of elections from the purview of the results test implemented through section 2(b).

There are two views on the breadth of this exception. The first suggests that the exception is merely "the reality that if there is only one official, there can be only one at-large election."[66] The second view "recognizes that where functions are singly exercised, providing single-member districts is no more than proportional representation in its most superficial form."[67] This latter view of the exception looks primarily to the function and duties of the

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62. See Weber, 73 Judicature 85 (cited in note 61).

63. 478 US 30 (1986). In *Thornburg* there was considerable disagreement concerning the establishing of racially-polarized bloc voting and the causation behind varying voting patterns. See notes 52 to 59 and accompanying text.

64. 779 F2d 141 (2d Cir 1985), cert denied, 478 US 1021 (1986).

65. *Butts*, 779 F2d at 148-49.

66. *League of United Latin American Citizens v Clements*, 902 F2d 293, 308 (5th 1990). This view defines the exception by focusing on a political unit's geographic boundary and the function of the office. Thus, there can be no vote dilution with regard to the office of state governor or city mayor, where there is a winner-take-all, at-large election.

67. *Clements*, 902 F2d at 308.

elected official and how those duties are to be executed. If there is nothing to divide, there can be no share of interest in the representation.[68]

III. Applying Section 2

A. *Cases Addressing Section 2's Application to State Judicial Elections*

The Fifth Circuit, in a rehearing en banc, overruled its prior precedent that state judicial election systems fall within the scope of section 2.[69] Such conflicting interpretations arise out of the use of the word "representatives" in subsection (b), a term which only appears in that section and is not defined in the statute.[70] There are now three schools of thought on this topic.

The initial circuit decisions concluded that subsection (b) does apply to state judiciary systems; this view is exemplified by the cases of *Chisom v Edwards*[71] and *Mallory v Eyrich*.[72] In *Chisom*, black registered voters in the Orleans Parish of Louisiana brought suit challenging the system for electing state supreme court justices.[73] Seven justices were elected from six districts. Five districts elected one justice each. The First District elected two justices and included the four parishes of Orleans, St. Bernard, Plaquemines and Jefferson. The First District was comprised of thirty-four percent minority voters and sixty-three percent white voters. Over half of the population and half of the registered voters lived in the Orleans parish. In this parish, fifty-five percent of the population was black, with a fifty-two percent majority of registered voters being black. Plaintiffs sought a division of the First District into two districts, with Orleans constituting its own single-member dis-

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68. Id.

69. *Chisom v Edwards*, 839 F2d 1056 (5th Cir 1988), which held that judicial elections are covered by section 2, was expressly overruled in *League of United Latin American Citizens Council v Clements*, 914 F2d 620, 631 (5th Cir 1990) (en banc).

70. The sentence in which the word representative appears is:

> A violation of subsection (a)[of this section] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) [of this section] in that its members have less *opportunity* than other members of the electorate to *participate* in the political process and to elect *representatives* of their choice.

42 USC § 1973(b) (emphasis added).

71. 839 F2d 1056 (5th Cir 1988). For the district decision, see note 2.

72. 839 F2d 275 (6th Cir 1988). For district court decision, see note 2.

73. *Chisom*, 839 F2d at 1057.

trict.[74] No black person had ever been elected to the Louisiana Supreme Court under the challenged system.[75] Plaintiffs alleged an historical record of purposeful and official discrimination and the existence of widespread racially-polarized bloc voting in the elections when these elections had included both minority and white candidates.[76] Plaintiffs also alleged that the State could no longer justify the current multimember district. Concluding that the phrase "to elect representatives of their choice" in the amended language of section 2 exempted the coverage of state judge elections, the district court dismissed plaintiffs' complaint for failure to state a claim upon which relief can be granted.[77]

On appeal, a three-member panel reversed the district court.[78] The decision examined the language of the Act, the policies behind amending section 2, the pertinent legislative history, the previous interpretations given to section 5 of the Act and the consistent position of the United States Attorney General.[79] The *Chisom* court first looked to the definition of "vote" and "voting" under section 14(c)(1) of the Voting Rights Act to discern what was within the purview of subsection (a) of the Voting Rights Act.[80] Noting that judges are "candidates for public or party office" and noting that even votes on propositions are within the preview of section 2, the *Chisom* court held that state judicial elections are within the scope of section 2.[81]

The *Chisom* court also rejected the argument that the Supreme Court's affirmance of *Wells v Edwards*[82] precluded the application of section 2 to judicial elections. The *Chisom* court, recognizing the distinction to be drawn between claims presented on the basis of reapportionment of judicial districts (based on concerns of popula-

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74. Id.
75. Id at 1058.
76. Id.
77. Id.
78. Id.
79. Id.
80. Id at 1059. Section 14(c)(1) defines the terms voting and vote as follows:

> The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate total of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

42 USC § 1973(c)(1).

81. *Chisom*, 839 F2d at 1060. This court considered this construction to be the only one consistent with the plain language of the Act. Id at 1060, n.1 and accompanying text.
82. 347 F Supp 453 (M D La 1972), aff'd, 409 US 1095 (1973).

tion deviations) and claims of racial discrimination resulting in vote dilution under section 2 and the Fourteenth and Fifteenth Amendments, rejected this argument.[83]

Concluding that judicial elections fell within the scope of subsection 2(a) and that any analysis of the Act "must be interpreted in a broad and comprehensive manner in accordance with congressional intent to combat racial discrimination of any kind in all voting practices and procedures," the *Chisom* court examined the legislative history with a view toward determining whether there was anything therein that would show congressional intent to exempt the judiciary from coverage under the Act.[84] The legislative history of the 1982 amendment reveals two instances from which it can be inferred that the congressional understanding was that the amendment applied to judicial elections. First, Senator Orrin Hatch, in comments contained in the Senate Report, stated that "the term 'political subdivision' covered all governmental units, including city and county councils, school boards, judicial districts, utility districts, as well as state legislatures."[85] Second, the House and Senate hearings on various versions of the Act were replete with references to the election of judicial officials under the Act. These references were to election results, which included judicial elections that either demonstrated an advance or loss of minority candidate success under the prior version of the Voting Rights Act.[86]

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83. *Chisom*, 839 F2d at 1061. This was based upon prior Supreme Court precedent which the *Chisom* Court summarized as follows:

> The distinction between equal protection principles applicable to claims based on one person, one vote principles of apportionment and those based on racial discrimination is not without prior Supreme Court precedent. *See White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (Court reversed decision of district court that reapportionment plan for Texas House of Representatives violated one-person, one vote principles, but affirmed the district court's conclusion that a particular portion of the plan unlawfully diluted minority voting strength.). *See also Graffney v. Cummings*, 412 U.S. 735, 751, 93 S.Ct. 2321, 2330, 37 L.Ed.2d 298 (1973) ("A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed to 'minimize or cancel out the voting strength of racial or political elements of the voting population.' ") (citations omitted).

Chisom, 839 F2d at 1061, n.2.

84. Id at 1061-62.

85. S Rep No 97-417, reprinted in 1982 USCCAN at 323; see *Chisom*, 839 F2d at 1062.

86. Id at 1062-63 (citing *Extension of the Voting Rights Act: Hearings on HR 1407, HR 1731, HR 2942, and HR 3112, HR 3198, HR 3473 and HR 3498 Before the Subcomm. on Civil And Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong, 1st Sess 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); *Voting Rights Act: Hearings on S 53, S 1761, S 1975, S 1992, and HR 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong, 2d Sess

Finally, throughout the Senate Report, Congress used the word "representative" interchangeably with "officials" and "candidates" when discussing the meaning of section 2; this the court thought further suggested that the congressional intent was not to give the word "representatives" a specifically technical legal meaning.[87] Also, there was no dissent from Senator Hatch's description or from the use of statistical data compiled from various judicial elections.[88]

Two other factors were used to bolster the decision in *Chisom*. First, the Supreme Court had summarily affirmed the trial court's decision in *Haith v Martin*,[89] wherein it was held that section 5 of the Voting Rights Act includes judicial elections within its coverage.[90] In *Haith*, the defendant state officials sought exemption from the preclearance requirements of the Voting Rights Act. They based their defense on the prior cases holding that the one-person, one-vote principle is not applicable to state judiciaries. The *Haith* court found the argument to be misplaced because the claim was based upon discrimination and not malapportionment, and stated that the Act applies to "all *voting* without limitation as to who, or what, is the object of the vote."[91] With no persuasive explanation as to why section 5 applies and section 2 should not when they both have identical language defining their scope,[92] the *Chisom* court explained that "statutory construction, consistency, and practicality point inexorably to the conclusion that if section 5 applies to the judiciary, section 2 must also apply to the judiciary."[93] Finally, the *Chisom* court found it noteworthy that the United States Attorney General's Office had consistently interpreted the Act as applying to state judicial elections.[94]

Mallory v Eyrich was another decision holding that subsection (b) does apply to state judiciary systems.[95] The suit in *Mallory* was brought by black residents of Cincinnati against the governor of

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669, 748, 788-89 (1982)).

87. *Chisom*, 839 F2d at 1063.

88. Id.

89. 618 F Supp 410 (E D NC 1985), aff'd, 477 US 901 (1986).

90. *Haith*, 618 F Supp at 413.

91. Id at 413 (emphasis in original); see also, *Chisom*, 839 F2d at 1063.

92. Both sections define their scope with the language "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. . . ." 42 USC § 1973(c) and § 1973(a).

93. *Chisom*, 839 F2d at 1064.

94. Id.

95. See note 72 and accompanying text.

Ohio, the secretary of state of Ohio, and the chairman and members of the Hamilton County Board of Elections. The suit alleged that the presence of racial bloc voting and the merger of the Municipal Court of Cincinnati and the Hamilton County Court had the effect of diluting minority voting strength in the city.[96] The district court dismissed the complaint on the basis that section 2 did not apply to judicial elections. The Sixth Circuit reversed, holding that section 2 does apply to judicial elections and employing a very similar analysis to that used in the *Chisom* decision to reach this result.[97]

B. *League of United Latin American Citizens v Clements*[98]

The opposite conclusion was reached by the Fifth Circuit sitting en banc in a rehearing of *League of United Latin American Citizens Council v Clements*. The United League of Latin American Citizens filed suit against the Attorney General of the State of Texas, the secretary of state and other state officials, alleging that the current county election of trial judges, with at-large elections on a county basis, diluted minority voting strength in nine targeted counties from which 172 of the 390 district judges were elected. These nine counties had multimember elections within the county.[99] The suit targeted Texas law which implemented a system of electing trial judges from the geographical area of the district court's jurisdiction (the county).[100] The plaintiffs sought a declaratory judgment, an injunction against further elections and the subdistricting of the nine targeted county districts.[101]

The district court rejected the plaintiffs' constitutional claims for failure to establish purposeful discrimination, but concluded from the totality of the circumstances that each targeted district

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96. *Mallory*, 839 F2d at 276. No black candidate had ever been elected to the Hamilton County court when a white candidate was on the ballot. Id.

97. *Mallory*, 839 F2d at 276-83.

98. 914 F2d 620 (5th Cir 1990) (hereinafter cited as "*Clements*"). This opinion contains the second and third of the aforementioned three schools of thought regarding section 2's application to state judicial elections.

99. *League of United Latin American Citizens v Clements*, 902 F2d 293, 294 (5th Cir 1990) (panel decision).

100. *Clements*, 902 F2d at 294. Originally, the Texas Constitution suggested that for each district there should be an elected judge. This was assumed to require equally-sized districts. However, the Texas Legislature had made modifications as the populations of certain counties grew extensively; a 1985 amendment to the Texas Constitution provides for the election of judges from areas smaller than a county, but this power had not been exercised by the voters. *Clements*, 914 F2d at 647.

101. *Clements*, 902 F2d at 294-95.

violated section 2 under the amended "results test" and its accompanying standard of proof.[102] The district court ordered a non-partisan election for the affected counties and divided the counties into subdistricts, tracing the districts of state representatives and precincts of county commissioners and justices of the peace to perfect a non-dilutive districting system.[103]

On appeal, the state officials argued that judicial elections were excluded from section 2 and, even if they were not so excluded, vote dilution claims cannot be upheld where the elected official singly performs all functions of the office.[104] The panel decision held that section 2, by its express terms, applied to state judicial elections, but that the single-member office exception exemplified in *Butts v City of New York* was applicable to the election of county judges.[105]

The majority opinion on rehearing decided that state judiciaries were beyond the scope of subsection (b) and, therefore, decided it was unnecessary to address the single-member office exception utilized as a basis for the decision below.[106] This appellate decision was based on the following analysis: (1) Congress was "at great pains" to phrase the results test of subsection 2 so that the test applied to representatives only (the legislative and executive branches); (2) the judicial office is not one characterized as a "representative" office; the statute in question is highly intrusive upon the independent sovereignty and character of the states and such statutes should not be pushed beyond their plain meaning—the word "representatives" as used in this statute suggests that term was not to be applied to the judiciary; and (3) Congress was aware of the *Wells v Edwards* decision which excluded the judiciary from

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102. Id.

103. Id.

104. Id at 295, 303. This second argument was based on the exception established in *Butts*; see notes 64 to 68 and accompanying text.

105. *Clements*, 902 F2d at 308. The precise holding reads as follows:

> After careful consideration we conclude that *Chisom* was correctly decided, and Section 2 of the Voting Rights Act applies to judicial elections. There cannot be a violation of Section 2(b), however, through at-large elections of the trial judges who sit on the Texas district courts. While elected judges are representatives in that they are accountable to a constituency of electors, the full authority of a trial judge's office is exercised exclusively by one individual, and there can be no share of such a single-member office. Consequently, the county-wide election of district court judges does not violate the Voting Rights Act.

Id. The opinion was issued on May 11, 1990 and a petition for rehearing en banc was granted on May 16, 1990. *Clements*, 902 F2d at 322.

106. *Clements*, 914 F2d at 624 (en banc).

the principle of apportionment in *Reynolds*, and without that principle, there exists no legal measurement for gauging a claim of vote dilution.[107]

The majority opinion in *Clements* can be boiled down into two lines of argument. One is that, when Congress amended section 2 by incorporating the language used in *White v Regester*, its changing of Justice White's phrase from "to elect legislators of their choice" to "to elect representatives of their choice" signified that the appropriate application of the results test should extend no further than to offices of representative form.[108] This argument assumes that Congress added a "new" results standard when it amended section 2 to include subsection 2(b), and that the scope of the results test should be confined to the inclusive words of that subsection; the results test analysis is separate and distinct from other violations of subsection (a) which may be applicable to the judiciary.[109]

The second tier of analysis is dependent upon the precedential value of *Wells v Edwards*. The opinion concludes that, because of the absence of the application of the one-person, one-vote principle to the judiciary, there exists no right to have one's vote weigh equally in judicial elections and, therefore, there can be no vote dilution claims in state judicial elections.[110] After deciding that

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107. Id at 622-23.

108. Id at 626. To support this argument the court cited nine federal court decisions decided prior to the 1982 amendment, which held that the judiciary is not defined as a "representative" office under the principles of malapportionment, and, therefore, no Fourteenth Amendment claim of unequal apportionment could be maintained. Id at 626, n.9.

109. Id at 625. It is interesting to note that the majority opinion stated that its "cardinal" reason for concluding that the statute does not apply to the judiciary is that state "judges need not be elected at all." Id at 622. This reason is not thereafter discussed or brought to bear on the situation. If this statement means that the states have options of elections or appointive systems, and the impact of this choice is freedom from the confines of federal law on point where one option is selected, it is surely false. If it means that any remedy ordered by the court can be simply avoided by the state switching systems, either the court may have the power to enjoin such an attempt based on its repugnant, invidiously discriminatory character (providing a time limit on state action attempting to change the effects of the court's remedy), which is an open issue, or it may be assumed at that point that because of the mandates of the Fourteenth and Fifteenth Amendments and the Voting Rights Act, the selection through the executive power would be imbued with that quality necessary to represent minority interests.

110. *Clements*, 914 F2d at 627. The precise language is as follows:

> *Wells* is not only instructive as to the meaning of "representatives" and thus as to the scope of Section 2, it is dispositive of the precise issue of the scope of Section 2's applicability raised in this case. . . . Absent the one-person, one-vote rule—that the vote of each individual voter must be roughly equal in weight to the vote of every individual voter . . . there is no requirement that any individual's vote weigh equally

"substantial equality" in voting is not applicable to judicial elections, the *Clements* court concluded that there existed "no yardstick by which to measure either the correct magnitude of minority voting strength or the degree of minority vote dilution."[111]

Judge Higginbotham wrote an opinion concurring with the judgment and reiterating his position that the single-member office exception is applicable to the facts.[112] The Chief Judge of the Fifth Circuit, Judge Clark, wrote specially to concur in the judgment of the court, but found both opinions deficient because of their reach in scope: the majority removed far too much from the purview of the section 2 results test; the concurring opinion's reliance upon the single-member office exception was not the relevant principle on which to base exclusion of the judiciary from section 2. Instead, suggested Clark, the principle which excludes the application of vote dilution claims from the contested judicial districts is the due process requirement that judges exercise neutrality in performing the functions of their office. This principle is applicable to all judges and is not specifically based upon an analysis of the functioning of the office. At both the trial and appellate levels, "[w]hen this neutrality is coupled with congruence of jurisdiction and electorate, they jointly assure equality in voting practices and procedures, negate representation and eliminate the possibility of vote dilution."[113] Judge Clark also espoused the view that subsection (b) did not define the only way that a section 2 violation could occur.[114] In addition, history might produce such gross numeric or

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with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the non-existent wrong complained of here.

Id.

111. Id at 628. The court bolsters this conclusion by lecturing on the intrusiveness of such federal "trenching" upon the core of state sovereignty which "strikes at federalism's jugular; . . . such a radical federal trenching as is contended for today should therefore demand a very clear statement [of congressional intent] indeed." Id.

112. Id at 634. Judge Higginbotham was the author of the panel decision and reiterated the same position: section 2 applies to judicial elections, but the single-member office exception exempts the election of trial level judges whose jurisdictional base is concomitant with their electoral base. Id at 634-51. This opinion was joined by four other judges. The author of the dissent joined in part I of this concurrence, while a judge concurring with the majority opinion specially concurred in part II of Judge Higginbotham's opinion (part I concluding section 2 is applicable to the judiciary, except for the single-member office exception which was elucidated in part II of the opinion). Id.

113. Id at 633 (Clark, specially concurring).

114. Id at 632. Judge Clark's analysis on this point proceeded as follows:

Judge Gee's reasoning would expressly deny Section 2(a) coverage to judicial elections in situations beyond today's facts, as he makes clear by overruling *Chisom v. Edwards*. Section 2(a) is an integral part of a remedial statute. It deserves to be inter-

racial disparities in judicial districting as to produce a violation of section 2, but the facts of the case presented no such situation.[115] Judge Johnson, the author of *Chisom v Edwards*, filed a dissent assailing both opinions as untenable and describing both as "dangerous."[116]

IV. Analysis

A. *Section 2 Applies to State Judicial Elections*

Given the judicial landscape outlined above, the Supreme Court will confront these conflicting theories regarding the scope and application of section 2. The Court should hold that section 2 applies to all types of state elections. In a democratic system such as the United States', little could be more fundamental than protective statutory rights regarding the individual's exercise of franchise. From a legal viewpoint, the Voting Rights Act is a critical weapon in combatting racial discrimination at the polls. Moreover, to resolve any ambiguity whatsoever, Congress should amend subsection 2(b) to read "and to elect *candidates* of their choice." This would remove any possible grounds for limiting the protective scope of section 2.

Moreover, the majority and concurring opinions in *Clements* make precedent which clearly results in frustration of the congressional purpose embodied in section 2. These opinions are far more reaching than necessary to the case, ignore the simple implication

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preted so as to prevent racial vote abridgement even when it occurs in a judicial election. The phrase 'as provided in subsection (b) of this section' which appears at the end of subsection (a) should read as giving an example of how to establish proscribed vote dilution. It does not provide that section 2(b) establishes the *only* way the section can be violated.

Id.

115. Id at 633. Judge Clark's disagreement with the scope of both opinions is emphasized in the following quotations:

> [W]e need not and should not decide now that judicial subdistricts which grow to have gross numeric or racial disparities in their make-up will always be free of possible Section 2 violations. For this reason, I respectfully, but expressly disagree with the majority's flat-out overruling of *Chisom v. Edwards*.
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> . . .
>
> The single-judge, trial court functional analysis proceeds solely on what the judge does and the way he does it. These analyses change no basic principles. If the coincidence of voter residence and jurisdiction does not exist, the same possible vote dilution violations mentioned above, which have nothing to do with the function of the office being voted on, could occur.

Id.

116. Id at 652. Judge Johnson's dissent is discussed in the following section of this article and is cited where appropriate.

of the result of the current practice found to be discriminatory, and present insidious reasoning for concluding that no violation of section 2 can occur in judicial elections. The precedent established therein is in conflict with the plain language used in section 2, is inimical to the statutory scheme evidenced by the Voting Rights Act, and should not be followed. The reasons for this conclusion are many.

First, consider the novel assertion that section 2 violations can be established by a results test (when purposeful intent is not present) only in those elections that fall within a class denoted by the word "representatives." This argument necessarily concludes that Congress intended subsection 2(b) to have the effect of withdrawing from coverage all types of elections not pertaining to the election of "representatives," a word which would then contextually have a very narrow and concise meaning. This position is not sound because subsection 2(a) defines the scope of the provision by commanding that "[n]o voting qualification or prerequisite. . ., standard, practice or procedure SHALL be imposed or applied . . . in a manner which RESULTS in a denial or abridgment of the right . . . to vote on account of race or color."[117] Subsection 2(b) merely codified the legal standard of proof used in the pre-*Bolden* cases. Neither the legislative history nor the plain language of the provisions evidence an intent to erect subsection 2(b) as a restrictive barrier to the scope of subsection 2(a).[118]

Congress expressly changed the wording of subsection 2(a) from "to deny or abridge" to "in a manner which results in a denial or abridgment of" in the 1982 amendment. Thus, the results test was expressly grafted into subsection 2(a) so as to clarify that a pattern of non-purposeful discrimination which resulted in a denial or abridgment fell within the purview of the statute. All aspects of the voting process fall within the broad language of subsection 2(a). The "results" focus of the statute is inseparably incorporated

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117. See note 39 for full text of subsection 2(a); see note 80 for full text of the definition of "vote" or "voting."

118. On this point, see *Clements*, 914 F2d at 638-39 (Judge Higginbotham, concurring). After analyzing the relationship of subsection 2(a) with 2(b), Judge Higginbotham concluded:

> [T]here is no reason to suppose that subsection (b), defining a type of proof sufficient under Section 2 was meant to withdraw all coverage from judicial elections. . . . A straightforward reading of both Sections 2(a) and 2(b) leaves little doubt but that Section 2(a)'s broad reach was never intended to be limited by use of the word representative in the explanation in Section 2(b) of how a violation might be shown.

Clements, 914 F2d at 638-39.

into what the statute forbids. Whether a practice, qualification, procedure, etc., is judged to violate the statute depends upon whether it is implemented "in a manner which results in a denial or abridgement." Subsection (b) cannot be read to add a new "results" test or provide an element which is not covered by subsection (a).[119] Therefore, the majority's opinion in *Clements*, which attempts to distinguish subsection (b) as providing the exclusive mandating of the "results test," is clearly in error.

The statute focuses on voting and the effect of the voting process on the opportunity to participate. "Vote" and "voting" are defined as including ballots cast for "candidates for public office." The statute's definition of "vote" and "voting" covers propositions and referendums, as well as all types of elections involving candidates.[120] Subsection (a) has an unmistakable breadth, which includes all and any type of voting or procedures linked to the processes of voting.[121] It follows, as most judges examining the issue have so found, that judicial elections fall within the scope of subsection (a).[122] This conclusion is additionally supported by the following factors.

The broad discretion vested in the trial court (the totality of the circumstances test) and the broad scope contemplated by the wording of the statute make clear that Congress expected a court, in hearing any claim presented, to closely scrutinize all evidence and related relevant social factors and to focus on the whole of the practice or procedure alleged to be discriminatory. The vesting of this discretion carries with it a serious obligation on the part of federal courts to root out entrenched voting patterns and practices which, because of districting and racially-polarized bloc voting, have resulted in less than a fair opportunity for minority voters to effectively participate in the electoral process. In addition to establishing extremely dangerous precedent, carving out large and statutorily unwarranted exceptions to the application of section 2 is an

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119. The majority in *Clements* concluded that the "results" test standard incorporated in subsection 2(b) is distinctive from the mandate of subsection 2(a), provides a new and highly intrusive cause of action against the states, and is, therefore, expressly limited by its literal language. The above analysis shows this proposition to be false. Moreover, as Judge Higginbotham has pointed out, it rests upon two premises which prove to be fallacious: (1) vote dilution claims were recognized long before the 1982 amendment and (2) the legislative history "generally indicates an intent to retain pre-*Bolden* standards rather than create a more intrusive new cause of action." *Clements*, 914 F2d at 640-41.

120. See note 80; 42 USC § 1973(c)(l).

121. 42 USC § 1973(a).

122. See all cases in note 2 except *Clements*.

abdication of this statute's corresponding judicial duty.

Next, the only shred of evidence for the majority's position in *Clements* is the use of the word "representatives" in an explanatory phrase within subsection 2(b). The entire legislative history reveals no discussion about limiting the scope of section 2 to discrete branches of state government. What relevant evidence there is in the legislative history leans toward a view that the judiciary is no different than any other state political body in relation to the scope of the Act: a voting practice or procedure is indeed a voting practice or procedure. Moreover, a review of the legislative history reveals that Congress used the words "representative," "candidate" and "elected official" interchangeably in debating the aims of the Act.[123] The Supreme Court did the same in *Thornburg*.[124] The statute and the accompanying legislative history are devoid of any indication that the word "representatives" was to have a specifically limiting and legally technical meaning.

The premise that judges are not representatives is not accurate. The judiciary serves an essential role in reference to our representative form of government. The judiciary represents the functioning of the collective common voice in a "representative" fashion, the same as do county clerks, sheriffs, treasurers, clerks of court and all other state and county officials.[125] The whole idea behind electing judges is that they are representatives of the governed.[126] Elections link accountability to representation; this point cannot be overemphasized. The inquiry is: at what level of conceptualization is the word "representatives" used? In a republican form of government, all exercises of governmental power legitimately derived from a consensus of the governed is said to be representative. At this level of conceptualization, all elected officials would fall within the meaning of the term. In fact, this broad usage is more in line with the broad language of section 2 and the remedial purpose evidenced by the entire Voting Rights Act. Presumably, the word should be accorded its broadest possible meaning. In short, there exists little evidence for drawing the opposite presumption.

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123. *Clements*, 914 F2d at 639; see also, *Mallory*, 838 F2d at 279 (five examples listed).

124. See *Thornburg*, 478 US at 48-51 for interchangeable usage.

125. *Clements*, 914 F2d at 636 (Higginbotham, concurring).

126. Judge Higginbotham, after tracing the impact of the Jacksonian revolution and bent on making the judiciary accountable to the electorate, concluded that "the effort to assure 'accountability' through elections is no more than an insistence that the judges represent the people in their task of deciding cases and expounding the law." Id at 636. See also *Clements*, 914 F2d at 654 (Johnson, dissenting).

A close reading of the words chosen shows that electing representatives is only a corollary and the end result of "hav[ing] [a fair] opportunity to participate in the political process."[127] This is the critical language of subsection 2(b). Where the processes "are not equally open to participation" because they are implemented in a manner which creates "less opportunity to participate in the political process," a violation of the statute exists.[128] There exists no indication that the corollary of "and to elect representatives of their choice" should be read as a mandatory element. Where referendums or propositions are submitted in a manner which, planned or not, results in a discriminatory vote dilution of minority voting strength, obviously a violation of the statute has been established, despite the fact that there was no election for "representatives." A legitimate and well-reasoned judicial analysis should conclude that electing representatives is not imperative to establishing a violation of section 2.

Construing the word "representatives" as limiting the scope of subsection 2(a) deviates from common canons of statutory construction.[129] First and foremost of these canons is the repeated affirmation by the Supreme Court that the Voting Rights Act be broadly construed in a manner consistent with its purpose.[130] Hornbook law suggests that a "reviewing court avoid statutory interpretations that lead to an absurd or inconsistent result."[131] Carving out major exceptions to this so broadly worded remedial statute is certainly inconsistent with the expressed purpose of the Act. Even if one concludes that the term "representatives" should normally be limited to a category of words connoted by the term "legislator," it is well established that a "literal statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose clearly manifested in an entire statute or statutory scheme or with clear legislative history."[132] The entire statute at issue manifests the purpose of eradicating, as far as is practical, all practices which in totality produce the discriminatory

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127. 42 USC § 1973 (cited in full in note 39).

128. 42 USC § 1973 (cited in full in note 39).

129. See *Clements*, 914 F2d at 654 (Johnson, dissenting).

130. Its purpose is to eradicate discrimination in any and all processes associated with voting. See *Katzenbach*, discussed in note 28 and accompanying text. See also *Allen*, discussed in note 27 and accompanying text.

131. *Clements*, 914 F2d at 654 (Johnson, dissenting) (citing *United States v Turkeete*, 452 US 576 (1981)).

132. *Clements*, 914 F2d at 653 (citing *Almendarez v Barrett-Fisher Co.*, 762 F2d 1275, 1278 (5th Cir 1985)).

result of denying minorities an opportunity to fairly participate. In short, an overwhelming amount of evidence suggests that section 2, in its entirety, is applicable to any combination of voting practices and procedures concerned with producing any electoral result.[133]

Arguments have been made that the vote dilution aspect of subsection 2(b) should not apply to the judiciary because of the entire statute's intrusiveness on state sovereignty. Yet, the statute expressly declares its applicability to any voting practices and procedures. Prior to the 1982 amendment, the Voting Rights Act was declared to be a codification of the Fifteenth Amendment.[134] The original language of section 2 was retained intact in the 1982 amendment, except for the incorporation of the "results"-oriented focus of the statute.[135] This change in focus did not change the breadth of the statute's scope. The Fifteenth Amendment certainly applied to the state judiciary prior to the 1982 amendment, and subsection 2(a) clearly shows that the basis of the Fifteenth Amendment's scope is retained in the current version of the Act. Declaring that state judicial elections are not now covered by the Voting Rights Act is tantamount to declaring that the Fifteenth Amendment does not apply to state judiciary elections, a conclusion which is clearly in error.

Moreover, the intrusive nature of the statute does not weaken the authority of Congress to require the states to conform to constitutional mandates and supplemental federal legislation in this area of civil rights.[136] The constitutionality of the Voting Rights Act was upheld shortly after the passage of the Act.[137] The intent to restore the pre-*Bolden* "purpose or effect" standard demonstrates that the "results test" was not intended to introduce a new cause of action and standard of review.[138] It was merely a clarification of the manner in which the statute was to have originally been

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133. Most judges which have surveyed the legislative history of the 1982 amendment reach the same conclusion. See for example, *Clements*, 914 F2d at 639 (Higginbotham, concurring) ("[T]he relevant legislative history . . . suggests that Section(b) was intended to reach all elections, including judicial elections. There is no hint that Congress intended to withdraw coverage.").

134. See note 31 and accompanying text.

135. See notes 31 and 39 and accompanying text.

136. See *Southern Christian Leadership Conference v Siegelman*, 714 F Supp 511, 517 (M D Ala 1989).

137. See notes 25 to 29 and accompanying text.

138. See *Clements*, 914 F2d at 642 (Higginbotham, concurring) ("Thus, intrusive as it is, the Act, including the anti-dilution provisions, applied to judges before the 1982 amendment. The suggestion that anti-dilution and results tests were introduced by the 1982 amendments is wrong.").

interpreted. The statute adds no new intrusive measure which limits its application.

There exists absolutely no evidence that the pre-*Bolden* cases were interpreting the Act as limited exclusively to particular branches of state government. That all these early cases dealt with legislative electoral patterns and practices is happenstance.[139] The statutory language in both the original and the current versions of the Act "cannot be parsed to read that judicial elections are not subject to dilution claims, but *are* subject to the remaining strictures of Section 2."[140] A straightforward reading clarifies that the commands of section 2 either apply or they do not; there is no middle ground.

As noted earlier, support for the conclusion that section 2 is not applicable to the judiciary has been said to derive from the *Wells* holding that the one-person, one-vote principle is not applicable. But *Wells* involved a challenge under the *Reynolds* principle which is race-neutral, while the Voting Rights Act maintains a race-based focus. Constitutional restraints on state action are heightened in this area; congressional authority is elevated in this area; and the statute is directly aimed at regulating any and all such practices. Struggling to develop standards which deal with combinations of racial voting patterns and state electoral practices bears little relationship to numerical equality. In fact, the first Supreme Court cases recognizing vote dilution claims made this very distinction.[141] This distinction is fundamental in that it shows the independence of the application of these two differing principles and the ability of a voting practice, procedure or scheme to violate one principle, but not the other. The claim that without the *Reynolds* principle there exists no basis for compelling state judiciary election systems to comply with the non-dilution requirements of section 2 is without merit. If anything, the lack of the *Reynolds* principle's applicability removes the normal remedial restriction of having to draw equally-sized population districts in a redistricting plan (assuming the first requirement of *Thornburg* is present[142]). Furthermore, it suggests there is all the more reason to fully investigate the alleged vote dilution claims under section 2, as this is the only review possible of such discriminatory voting practices.

Wells and subsequent cases held that judges are not "represent-

139. Id at 642.
140. Id at 643 (emphasis in original).
141. See notes 4 to 9 and accompanying text.
142. See notes 51 to 63 and accompanying text.

atives" because they are not elected officials who represent constituents in a policy-making body. The argument implies that Congress must have used the word "representatives" in a similar fashion. This argument, in reality, rests on a principle of "definition by incorporation." Yet there exists no evidence in the legislative history or the statute itself which suggests any such intended meaning.[143] Moreover, this contention has been placed in great doubt by the Supreme Court's affirmance of lower court decisions holding that section 5 is applicable to state judicial elections.[144] Section 5 uses almost identical language to section 2 in defining its applicable reach.[145] Section 5 pertains to any new change being implemented by the states and requires preclearance by the Attorney General.[146] Given the express affirmation that section 5 applies to the judiciary, it would be illogical to conclude that a practice producing a discriminatory result should be left intact under section 2, while, if the same result were foreseeable, such a scheme would not be permissible under a "new practice" regulated by section 5. Surely Congress intended no such inconsistent result.[147] There exists no reason why one section should expressly apply to the judiciary and the other should not, especially in light of the fact that both use the same operative language in designating their scope.[148]

As all of the above analysis indicates, the only sound judicial position on the issue raised by *Clements* is that section 2 applies to state judiciary elections. This conclusion is necessary to a legitimate and authoritative exercise of the federal judicial power.

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143. *Clements*, 914 F2d at 643-44 (Higginbotham, concurring).

144. See *Lefkovits v State Board of Elections*, 400 F Supp 1005, 1012 (N D Ill 1976), aff'd mem, 424 US 901 (1976) ("[W]hen a judge is to be elected or retained, regardless of the scheme of apportionment, the equal protection clause requires that every qualified elector be given an equal opportunity to vote and have his vote counted."); *Haith v Martin*, 618 F Supp 410, 413 (E D NC 1985); aff'd mem, 477 US 901 (1986) (Section 5 of the Voting Rights Act applies to state judiciaries specifically; "the Act applies to all voting without any limitation to who, or what is the object of the vote."); *Brooks v State Board of Elections*, 1989 WL 180759 (S D Ga 1989), aff'd mem, 111 S Ct 288 (1990).

145. Section 5 brings within its scope "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting." 42 USC § 1973(c).

146. Only the effect of the new practice is examined, and, therefore, section 5 is said to implement a "retrogression" test (preclearance will be denied only if the new practice has a retrogressive effect; the effects of the current practice are not evaluated). See *City of Lockhart v United States*, 460 US 125 (1983).

147. *Clements*, 914 F2d at 645.

148. See note 145.

B. *Section 2 Does Not Mandate Differential Treatment Within the Hierarchy of a State Judiciary*

A thorough analysis of *Clements* would not be complete without commenting upon Judge Higginbotham's attempt to conceptualize the protections against vote dilution codified in the Voting Rights Act as dealing only with offices which are politically responsive to voter demands. According to this view, voting for members of a collegial policy-making body - for example appellate judges - would be within the scope of section 2, while voting for singly-performed offices - for example trial judges - would not be within subsection 2(b)'s scope. This approach interprets the "single-member office" exception established in *Butts* with a new and unprecedented twist, and is likewise flawed in its logic and reasoning.

The above analysis incorrectly switches the focus of inquiry away from the voter and his opportunity to effectively participate in a voting process, free from the discriminatory dilution or cancellation of minority voting strength (as section 2 directs) and focuses the inquiry on some subjective conceptualization of the "functioning" of the public office in question.[149] Nothing in the text of the statute warrants this subjective conceptualization. Nothing suggests that a broad and sweeping exception should be established by focusing on the office in question. The end result of such an exception would render the statute applicable to almost no elections which produce elected county officials; in the broadest sense, all elected officials singly exercise their vested public authority. Judicially creating such an exception is certainly in conflict with the specific purpose of the Act and cripples the scope of section 2 as delineated in subsection 2(a).

Judge Higginbotham's concurrence basically asserts that there can be no vote dilution claim where the exercise of sovereignty is performed singly, within a discrete geographical boundary, regardless of whether there are one or four hundred such posts in the

149. *Clements*, 914 F2d at 655 (Johnson, dissenting). Judge Johnson points out that

> [t]he Senate Report accompanying the 1982 amendments indicates that the Voting Rights Act was designed not only to correct active discrimination, but to 'deal with the accumulation of discrimination.' Senate Report Accompanying the 1982 Amendments to the Voting Rights Act at 5, 1982 U.S. Code Cong. & Admin. News at 182. Especially in light of [all the relevant] history and language of the Act, it is axiomatic that the relevant inquiry centers on the *voter*—specifically, the minority voter—*not* on the elected official. The Act is, after all, the *Voting Rights* Act.

Clements, 914 F2d at 655 (emphasis in original).

relevant unit of state sovereignty.[150] This position resurrects the specter of the proper interaction of federal and state sovereignty and evaluates its place in today's federalism. This asserts that the decision of the state to tie electoral accountability to the geographical basis of the office's authority (in an office in which the full authority is exercised by one individual) is based upon a "state interest" which justifies an exception to the application of section 2.[151] This analysis is in error for a number of reasons.

First, voting is a fundamental right expressly conferred and protected by the Constitution. Section 2 is said to implement this protection.[152] In order to impinge upon this right, the state is required to establish a "compelling" state interest and demonstrate that the regulation in question is narrowly tailored to specifically advance that interest. Acknowledging that a legitimate state interest exists in this area is one thing; asserting that the at-large multimember elections in question are necessarily tailored to advance that interest is another. An inquiry into the necessity of the state practices to the preservation of the advanced state interests was not undertaken by Judge Higginbotham. Methodologically, the approach utilized to review the asserted state interests falls far short of a proper inquiry under the applicable standard of review.

Second, the decision in *Butts* dealt with a mayoral election, a situation in which the electorate cannot be subdivided.[153] The shift in focus from the ability to subdivide the electorate to the ability to subdivide the function of the office is totally unwarranted. The problem raised by the situation in *Butts* deals with the practical problem of a court being able to provide a remedy, an element necessary for standing under Article Three's "case or controversy" requirement. This understanding and conceptualization of the problem is more pragmatically accurate and creates less of a sweeping exception to the scope of section 2. For example, where the electoral position is unique to one exclusive jurisdiction and its functions are solely executed, there exists a strong presumption against a finding of vote dilution. Because of the geographical uniqueness to such offices, there can be no vote dilution in the election of a state governor or city mayor. Consequently, a court cannot grant a remedy in this situation: there is simply nothing to dilute.[154] However,

150. Id at 648-49 (Higginbotham, concurring).
151. Id at 650.
152. See note 31.
153. *Clements*, 914 F2d at 661 (Johnson, dissenting).
154. Id at 662. Judge Johnson notes prior precedent on this position as follows:

where there are elections of multiple candidates to virtually identical positions in one geographic area, there exists a very real chance that vote dilution can occur.[155] Additionally, because there are multiple positions with identical functions, a court will have the ability to fashion a remedy which will equally open the voting process in a way that avoids the proven submerging of minority voting strength by white bloc voting. The requirements of *Thornburg* add much credence to this proposed remedial analysis advanced to deal with the *Butts*-type problem.[156]

The error in *Clements* is one of failing to realize that the Voting Rights Act gives a right to effective participation, not a right to a share in responsive representation promulgated by a collegial body. The election of trial judges involves a share of a state-wide branch of government. The question of effective participation in the election of trial judges in an at-large, county-wide election, wherein multiple candidates are elected, is distinct from the political advantages and responsiveness being gained by that effective participation.[157] To attach the condition of gaining immediately measurable "responsiveness" and "accommodation of minority needs" from the office to the application of section 2 is completely contrary to the explicit language of section 2. Such forced requirements obfus-

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> In *Southern Christian Leadership Conference v. Siegleman*, 714 F Supp 51 (M.D. Ala. 1989), the court rejected the application of *Butts* to the election of several trial judges from a single county . . .
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> In effect, the at-large boundaries [in *Butts*] coincide with the only 'district' boundaries possible; because there is only one position to be filled, it becomes impossible to split the jurisdiction any smaller. The concept of vote dilution is effectively rendered meaningless and such offices are inappropriate for section 2 vote dilution challenges. There is no such rationale, however, for not applying section 2 to elected positions merely because 'the full authority of that office is exercised exclusively by one individual,' as the defendants would have this court do. *Siegleman*, 714 F Supp at 519-20 (footnotes omitted).

Clements, 914 F2d at 662.

155. Id.

156. Meeting the three preliminary requirements of *Thornburg* seems to ensure that if there is legally-cognizable discrimination, the courts will be able to implement an effective remedy. See notes 52 to 59 and accompanying text, which discuss the requirements imposed by *Thornburg*.

157. Judge Johnson noted that the Senate Report provides guidance as to how the factor of "responsiveness" is to be handled by the courts:

> It is true that one of the Senate Report factors that may be probative in a vote dilution case to establish a Section 2(b) violation is 'whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.' S.Rep at 29, 1982 U.S. Code & Admin. News at 207. However, the Senate Report emphasizes that '[u]nresponsiveness is not an essential part of plaintiff's case.' Id at n.116.

Clements, 914 F2d at 656, n.9.

cate the effectiveness of the relevant inquiry into whether cumulative practices have produced legally-cognizable minority vote dilution in these multimember, county-wide, at-large judicial elections.[158]

Judge Higginbotham's opinion asserts that the union of electoral base and jurisdiction defines the very nature of the Texas trial judge's position. These two factors assertedly create a "compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest."[159] The assumption is that any modification in the electoral base of the trial judge will have an adverse effect on the way judges dispense justice, destroying the appearance of judicial impartiality. There is absolutely no validity to the assumption that the imposition of a non-dilutive voting scheme would effect the way Texas trial judges perform their public functions.[160]

In *Clements*, the State of Texas asserted the following reasons for maintaining the current system: (1) to assure popular accountability; (2) to avoid bias caused by small electoral districts; and (3) to preserve the administrative advantages of at-large elections, including the use of specialized courts. Upon close examination each of these interests proves to be less than compelling. By definition, administrative convenience can never be a compelling state interest where a fundamental right is involved. Moreover, although accountability and impartiality are legitimate state interests, the current implementation of the multimember districting system in the nine contested counties is simply not narrowly tailored nor necessary to the preservation of the proposed state interests.

The issue of accountability assumes that local voters will lose some aspect of political control over judges not accountable to most litigants who are likely to appear in their court rooms. It is further assumed that this loss creates adverse effects upon official judicial behavior. Such an assumption flies in the face of a judge's

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158. See note 39 for language of subsection 2(a).

159. *Clements*, 914 F2d at 646 (Higginbotham, concurring).

160. Id at 664 (Johnson, dissenting). Judge Johnson's words were as follows:

> It is inconceivable that the remedial imposition of a non-dilutive electoral scheme would have a more than negligible effect on the method by which judges exercise their authority. The concurrence cites no evidence—because there is none - that the *very nature* of the judicial office will be irreparably damaged by a modification in the elective base. In the absence of such evidence, it can hardly be said that the continued unmodified union of elective base and jurisdiction is a 'compelling' state interest which mitigates against the application of the Voting Rights Act.

Id.

oath to be impartial and to objectively dispense justice. Such an assumption ignores the true effect of the current dilatory nature of venue practices and the accompanying doctrine of waiver upon failure to raise timely objections to defects in venue.[161] Moreover, it is both common and state constitutional practice in Texas that district court judges are called into other counties to help with crowded docket control. Along the same lines, Texas vests senior judges with all the authority of their elected counterparts, even though upon retirement the senior judges are no longer elected to office or run in retention elections. Texas' justices of the peace are elected from county subdistricts, but have county-wide jurisdiction.[162] The Texas Constitution permits the subdistricting of current county-wide elective jurisdictions.[163] The State's own practices reveal that accountability to the entire electorate within the jurisdiction is not necessarily compromised by smaller electoral districts or even the lack of elections all together.

Suggesting that subdistricting "would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not the fact worthy of its judicial independence"[164] directly implies that judges elected from smaller districts are more susceptible to outside influence from organized special interest groups. This bald assertion would seem to defy the current reality; generally, voters follow with minimal interest the case work of the judges elected within their districts.[165] There exists little empirical evidence to verify the belief that subdistricting would produce judges with less judicial integrity and fortitude. The process of appeal would seem to be the only check necessary to legally-biased judicial behavior.

Appearance of judicial independence is quite simply empirically

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161. Id at 668.

162. Id.

163. See note 100.

164. *Clements*, 914 F2d at 650 (Higginbotham, concurring).

165. See Anthony Champagne and Greg Thielemann, *Awareness of Trial Court Judges*, 74 Judicature 271 (1991). After conducting a random sample of voters in Dallas County, Texas, with a methodological error rate of three percent, the authors concluded as follows:

> First, not surprisingly, judges do not have the name recognition that more political officeholders have such as U.S. senator and mayor. This pattern holds across all ethnic groups studied. In general, voters were unable to recognize the name and provide the office of the judicial officials in the survey. Additionally, all ethnic groups tended to be unaware of the ethnicity of judges; although voters of one ethnicity were somewhat more able to identify ethnicity of officials from their own ethnic group.

Champagne and Thielemann, 74 Judicature at 275 (cited in this note).

demonstrated by the record of in-office performance. The assertion that subdistrict candidates elected to the bench are more susceptible to judicial misconduct, destroying the appearance of the bench's independence from political forces, is simply an hypothesis rooted in unfounded and unsubstantiated fears. Even if smaller electoral groups could be more easily manipulated, this is no reason to assume that the individual judges would compromise their professional values and reputations merely upon the electorate's whim. In fact, the accepted judicial mores and applicable codes of conduct mandate the opposite.

The multidistrict counties involved in *Clements* could have been subdivided into single-member districts with populations larger than other small county populations.[166] This, coupled with the fact that justices of the peace are elected from subdistricts yet retain county-wide jurisdiction, tends to cast great doubt on the argument that subdistricting here would raise the likelihood of a biased appearance.[167]

Maintaining accountability through jurisdictional at-large elections is certainly no compelling state interest. Further, the practice in question has not been shown to be necessarily required and narrowly tailored to advance the state interests of impartiality and accountability. In short, there exists no sufficient overriding state interest which should allow the dilutive effect of the contested at-large, multimember judicial elections to continue. All advanced state interests are easily maintained by other constitutional practices and procedures.

V. Conclusion

Section 2 applies to all aspects of voting, no matter who or what is the object of the vote. All forms of state judicial elections fall within its purview. Whether vote dilution is present is judged by the totality of the circumstances surrounding the controversy; the results of all related practices and procedures involved is an important factor in the analysis, no matter what type of election is involved. The single-member office exception established in *Butts* should be viewed as a remedial problem created by singly-held of-

166. *Clements*, 914 F2d at 669. For example, if Harris county, with a population of 2.5 million, were subdivided into 59 judicial districts, each district would have approximately 41,000 people. The smallest judicial districts (counties) in Texas range from 24,000 to 50,000. Id.

167. In fact, the district court's remedial redistricting was partially based on the subdistricting of these offices for justices of the peace. See note 105 and accompanying text.

fices which are geographically unique to the entire state. Respect for the Act's mandate and the language used therein demand nothing less.

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